

AES

Issue

Our concerns regarding potential releases in Puerto Rico of "Agremax," an aggregate of ash generated by the AES PR coal-fired power plant in Guayama, have been largely allayed. Agremax is currently covered by the EPA CCR Rule, which precludes uncontrolled land placement, and is being disposed in an appropriate lined landfill.

AES and its subsidiaries, including AES PR, are currently litigating in at least four courts with respect to the CCR final rule, the management and disposal in Puerto Rico of ash generated at the Guayama power plant, and the past disposal in the Dominican Republic of ash generated at the Guayama power plant.

Litigation by citizen's groups and municipalities over the disposal of Agremax/ash in lined landfills is also ongoing.

Status

Coal Combustion Residuals Final Rule Litigation

The EPA CCR rule was finalized in April 2015 and became effective October 2015. AES, amongst a group of seven petitioners - the Utility Solid Waste Activities Group, et al. - has sued the Agency in the U.S. Appeals Court for the District of Columbia to stay the requirements and vacate portions of the CCR rule. EPA held discussions with the petitioners, and in April 2016 DOJ filed a motion with the court to remand certain requirements of the rule and a brief in defense of the Agency's position on the issues remaining under litigation.

Guayama Power Plant Agremax Storage

We understand AES is now building an impervious liner under the Agremax pile, with construction slated to be completed in May 2016. Once Agremax is no longer placed directly on the ground, the pile will cease to be an "existing landfill" under the rule and will no longer be regulated by the rule, although the other rule requirements, such as those for any subsequent beneficial reuse of Agremax, will remain in effect. However, the solid waste permit issued by EQB in October 2015 for the Agremax pile requires storage of Agremax in a fully enclosed structure, which we understand AES has contested. AES's challenge to EQB's permitting authority over the Agremax pile remains in litigation, and EQB's argument of its Motion to Dismiss is scheduled to be heard by the Appellate Court in May 2016.

Agremax Disposal

AES told us in January 2016 that Agremax was being sent for disposal in the lined EC Waste El Coqui landfill in Humacao and was not being shipped to the mainland. EQB informed us that AES is currently litigating municipal disposal bans before the PR Supreme Court and that no decision has yet been made, while the District Court had previously upheld the bans.

EC Waste is litigating in the Ponce region first instance court with a citizen's group, the Talleboa Committee, over the Committee's blocking of trucks/facility access for ash/Agremax disposal. EC Waste believes they are authorized by EQB Resolution and the court is exploring this. EQB, and later CEPD/DECA, have met with the Committee to hear their concerns. CEPD/DECA are evaluating their letter to Jose Font regarding the potential for, and EPA's regulatory role in, the reclassification by EQB of Agremax/ash to hazardous waste, and the existence of and EPA's actions regarding legacy sites in PR.

The Penuelas municipality is in supreme court defending their ordinance ban. EQB's position is that the municipalities cannot supersede EQB on solid waste issues.

Dominican Republic Lawsuits

In 2006, AES was sued in Virginia by the government of the Dominican Republic for alleged conspiracy and dumping of 80,000 Tons of coal ash in 2003/2004 generated by its subsidiary AES PR. The case was settled in 2007 for a reported \$6 M, and ORC notes that the settlement stated that AES had not violated Dominican Republic law.

In 2009, AES was sued in Delaware Superior Court by multiple plaintiffs in a mass tort lawsuit that alleged birth defects and fatalities from coal ash exposure. The Delaware court has denied AES's January 2016 motion for separate trials of the individual plaintiffs, and the two week trial is scheduled to begin in April 2016 against AES and four subsidiaries. The lawsuit seeks \$29 M in damages for claims for intentional tort, negligence and strict liability under Dominican Republic law, and is the first trial of seven cases brought against AES on this matter. At the RA's request, the Region is providing technical information on CCRs published by EPA to the Dominican Republic Ministry of Environment (Rosa Otero, EPA's point of contact via our free trade agreement). However, we note that the documents are not in Spanish and may be difficult for the ministry to interpret – we plan to refer any questions to CEPD for assistance.

Options and Recommendations

- DECA will remain in close coordination with EQB, and, as necessary, ORCR, concerning the applicability of CCR rule requirements and other developments.
- CASD/CEPD/DESA, with DECA technical assistance as needed, will coordinate on a study of arsenic levels in soil and groundwater at the AES north well field and potentially the "road to nowhere."
- ORC will subsequently assess the viability of the data to support potential "legacy site" enforcement action, possibly under CERCLA.
- CEPD, with DECA technical assistance as needed, will inspect the PR landfill(s) receiving AES' CCRs to ensure operational controls are in place, particularly with respect to fugitive dust.

Background

CWA Permit

AES has complied with a March 2015 CWA Consent Order issued by the Region to address stormwater permit violations.

EQB Agremax Resolution

At our urging, EQB issued a September 2014 Resolution retracting its earlier Resolutions on Agremax and requiring that Agremax either be disposed, or beneficially used only with prior EQB approval. Also at our and EQB's urging, the PR Electric Power Authority and AES entered into an amended power purchase agreement in July 2015 that allowed on-island disposal, which had been restricted under the previous agreement.

EQB CCR Regulations

We understand that EQB is working on publication of new regulations incorporating the CCR rule and it is in discussion with CASD and ORCR/OGC to this effect.